

May 29, 2015

**VIA E-MAIL**

General Counsel  
Government Accountability Office  
441 G St., N.W.  
Washington, DC 20548

Re: Protest of Request for Lease Proposals Number 1MP2006  
Building: U.S. District Courthouse  
Gualo Rai Road, Gualo Rai, Saipan, MP  
Award Date: March 30, 2015  
Debrief Date: March 30, 2015  
Agency Protest Date: April 7, 2015  
Agency Protest Decision: May 21, 2015  
Our File No.: 128442-202297

Dear Sir or Madam:

**PROTEST**

On behalf of Marianas Management Corporation ("MMC"),<sup>1</sup> the undersigned attorneys hereby protest the unlawful award by the U.S. General Services Administration ("GSA") of a new construction lease of 35,696 ABOASF for the United States District Court, United States Probations Office, United States Marshals Service and United States Attorneys Office in Saipan, MP (the "RLP" or Solicitation") (Excerpts provided as Exhibit 12). In making this award, the Government did not follow the requirements of the RLP and the guidance of the applicable Federal Acquisition Regulation regarding proposal evaluations.

**PROCEDURAL MATTERS**

This protest is timely submitted:

1. MMC received post-award notice (Exhibit 11) indicating the award was made to EFC Services Corporation ("Awardee") on March 30, 2015;

<sup>1</sup> MMC's address is PO Box 500137, Saipan, MP 96950. Telephone number is (670) 234-6445 and Facsimile Number is (670) 234-6446. Email address for MMC is in care of Mr. Yenny Tom, CFO, yennytom@pticom.com.

2. MMC timely filed an Agency Protest with the GSA on April 7, 2015;
3. The GSA issued its Agency Protest Decision on May 21, 2015 (Exhibit 13); and
4. This Protest is filed within ten days of the Agency Protest Decision pursuant to 4 C.F.R. 21.2(a)(3).

MMC is an interested party because it submitted a responsive offer pursuant to the RLP and would have won the contract had the Government properly evaluated its offer and that of the Awardee. Accordingly, MMC's direct economic interest was affected by the award of the contract.

The US Government Accountability Office ("GAO") has jurisdiction to hear this protest of a competitive solicitation because it arises from a solicitation by a federal agency in violation of statute and the FAR. The protest is based on the GSA's improper evaluation.

Pursuant to 4 C.F.R. § 21.1(e) a copy of this Protest is being provided to the Contracting Officer via email and overnight delivery, as well as counsel for the GSA representing the agency in the Agency Protest.

MMC specifically requests a ruling from the Comptroller General on this protest and recommending that the contract be awarded to MMC. In the alternative, MMC requests a ruling that the GSA re-evaluate the proposals per the RFP or re-solicit the lease. MMC requests that the GSA suspend contract performance during the pendency of this Protest pursuant to 4 C.F.R. § 21.6 and that MMC be awarded its fees and costs if this protest is sustained and, if appropriate, the cost of MMC's bid and proposal preparation.

### **BACKGROUND AND BASIS FOR PROTEST**

MMC is locally owned small business incorporated in 1978 to buy, develop and manage property in the Northern Mariana Islands. MMC currently owns and manages approximately 200,000 rentable square feet of commercial and residential space. The largest is 68,000 sq. ft. of rentable space in the DanDan Commercial Center which is 100% occupied. In addition, it owns and operates 2 other smaller commercial buildings with approximately 40,000 square feet each.

In September 2013, the Government issued an RFP providing for the award of a 20-year firm lease agreement for precisely 36,429 square feet of contiguous space to house the U.S. District Court, U.S. Probation Office, U.S. Marshals Service, U.S. Attorneys Office, and supporting spaces on the island of Saipan. MMC timely submitted a proposal.

The RFP was evaluated on price and five equally weighted Technical Evaluation Factors with the technical factors being **"less important than price."** (Exhibit 12, RLP, § 4.04 D. I.) MMC's proposal offered a significantly lower price with an overall present value savings to the Government of \$54,245 per year (based on the information proved in the post-award notice.)



Moreover, the Awardee's site did not comply with the material property specifications in the RLP in at least two particulars: (1) the Awardee site location is within the Tsunami inundation zone as defined by the RLP; and (2) the Awardee site is in excess of the ½ mile proximity to restaurant facilities. A protest should be sustained if it is determined that an awarded lease proposal is non-compliant with a material solicitation requirement. *Federal Builders, LLC—The James, R. Belk Trust*, B-409952, Sept. 26, 2014, 2014 CDP ¶ 285, p. 3 (protest of lease award sustained where awardee proposal was found non-compliant.)

Finally, the evaluation of MMC's proposal was in error in a number of specifics in that the agency's judgment failed to take into account relevant information or scored criteria without a reasonable basis. These include, specifically:

(1) No rational basis for comparing price with technical factors where the RLP provides that the technical factors will be less important than price;

(2) Giving no credit to the addition of Mr. Dan Reitner as consultant to the Project Manager;

(3) Incorrectly evaluating the Kagman Community Health Center Past Performance Reference – one that provided an average score of 8 out of 10 (GSA Exhibit 17) – as “marginal” and arbitrarily penalizing MMC for failing to offer an explanation for what is, in fact, a favorable Reference.

(4) Unreasonably penalizing MMC's Facility Design in the initial “first generation plans” and “Concept Drawings” stage where the RLP requires Design Intent Drawings to be developed **post-award** and in **collaboration** with the Government;

(5) Ignoring or misevaluating specific design aspects provided in MMC's materials, such as final ceiling heights compatible with the provided elevations, blast resistant design features, security features, façade options at Government's choosing (not MMC's), and clearly shown utility rooms, loading dock, emergency generator and garbage facilities.

(6) Inaccurately downgrading MMC's site proposal based on pure speculation that road construction or site preparation (demolition or remediation) might delay completion.

MMC's protest should be sustained because the Awardee's proposal offered a non-compliant site and MMC's proposal was inaccurately, and thus unreasonably, evaluated.

#### **1. Awardee's Site is Within the RLP Tsunami Inundation Zone.**

Most significant for this Protest, the Awardee's site fails to comply with the RLP requirements because the site is within the Tsunami inundation zone as defined by the RLP. Paragraph 1.03 of the RLP defines the Tsunami inundation zone to include: “**1/4 mile inland from the shoreline (high-water mark) from Puntan Susupe, north to Micro Beach/Puntan Muchot, unless site at minimum 30 free elevation above sea level.**” (Exhibit 12, p. 5).



Geographically, the Awardee's site is located on the west side of Saipan, south of Puntan Muchot, and  $\frac{1}{4}$  mile from the shoreline. This is demonstrated by the GSA's own exhibit submitted during the Agency Protest (GSA Exhibit 25, attached hereto), which is a Google Earth image that is oriented with north at the top of the page, and MMC's Exhibit 14. As is shown, because the shoreline wraps both east and south from Putan Muchot, the Awardee site is clearly south of Putan Muchot and within  $\frac{1}{4}$  mile of the shoreline.

Furthermore, to qualify for the elevation exemption from the shoreline proximity, the RPL requires that the "site" be a minimum 30 feet above sea level. The GSA's Agency Report, and building elevations (GSA Exhibit 27, attached hereto), only references the elevation of the proposed building – not the entire site. In fact, according to the RLP, Paragraph 1.03, the boundary of the site must be within 200 feet of Chalan Pale Arnold Road. While it may be possible to elevate the building itself to 30 feet, if placed some 400 feet off Chalan Pale Arnold Road, the edge of the site 200 feet from Chalan Pale Arnold Road is only 17 feet in elevation, again shown in MMC Exhibit 14.

It was understood from the discussions with GSA that one of the main reasons for relocating the District Court from its present location in the Horiguchi Building (Garapan, Saipan) was to relocate the Court outside the Tsunami zone. While the Awardee site is non-compliant, the MMC site exceeds the elevation requirements.

During the Agency Protest proceeding, the GSA attempted to limit the scope of the Tsunami inundation zone and exclude the Awardee's site by claiming that the zone only extended a  $\frac{1}{4}$  inland "at" Puntan Muchot, and by referencing the NOAA *Tsunami Hazard Assessment Special Series: Vol. 3*, Tsunami hazard assessment of the Commonwealth of the Northern Mariana Islands (available at <http://nctr.pmel.noaa.gov/pubs.html>).<sup>2</sup> However, the description of the zone is not that limited in the RLP, and the specific information provided in the NOAA report is not consistent with the GSA's position. As showing on the attached excerpted maps from the NOAA report (Exhibit 15), during an anticipated Tsunami event, the shoreline within a  $\frac{1}{4}$  adjacent to the Awardee's site would experience 7 meter waves traveling at 8 meters per second. Superimposing the NOAA calculations over a site map of Saipan showing the Awardee site, it places the site in the inundation zone. See Exhibit 16. Further, the second page of Exhibit 16 shows MMC's proposed site as clearly outside the inundation zone.

Finally, it should be noted that, as shown on Exhibits 14 and 16, the only point of ingress and egress to and from the Awardee site is to Chalan Pale Arnold road to the northwest – towards the shoreline – at an elevation of lonely 17 feet. The Awardee's site is literally backed against a cliff-line with no means of evacuation to safety. MMC's site, on the other hand, allows for ingress and egress towards Middle Road and the center of the island and higher ground.

---

<sup>2</sup> The GSA, while not linking to the report, referenced a date for the report of November 2012. The only published NOAA report on the Northern Mariana Islands, however, is dated April 2013.

**2. Awardee's Site is Not Within One-Half Mile of Required Amenities.**

In addition, the RLP requires that "[a]dequate eating facilities shall be within the immediate vicinity of the Building, but generally not exceeding a walkable ½ mile, as determined by the LCO." (Exhibit 1, Paragraph 1.04). During the Agency Protest procedure, the GSA claimed that the Awardee site was within ½ mile of the Paradise Hotel & Restaurant. This is in error. As shown on Exhibit 14, a Google Earth calculation shows the distance between the Awardee site is, in fact, .68 miles from the Paradise Hotel.

**3. MMC's Proposal Was Incorrectly Evaluated on the Price and Technical Factors.**

**(a) Price Comparison With Technical Factors:** The GSA offered no explanation as to how it weighed the "more important" price factor against the technical factors. The MMC proposal would save the Government nearly \$1 million over the life of the lease. An agency must include in its final award decision "the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs." FAR 15.308. "Conclusory statements, devoid of any substantive content, . . . fall short of this documentation requirement." *Serco Inc. v. United States*, 81 Fed. Cl. 463, 497 (2008). The GSA offered no explanation of the rationale used to determine that the technical factors more than outweigh the MMC's million dollar savings.

**(b) Technical Factors**

**Factor 1: Development Team and Key Personnel Experience.**

**No Credit Giving To Mr. Dan Reitner:** MMC was scored 7.0/10.0 with the deficiency expressed as the lack of experience of the designated Project Manager. However, the evaluation failed to take into account the submission of Mr. Dan Reiter's qualifications with the Best and Final Offer. (See Exhibit 1.)

The GSA admitted in the Agency Protest proceeding it gave no credit for the addition of Project Manager team member Dan Reitner despite his extensive credentials. It was error to give no credit. Mr. Reitner was brought on to the project and his extensive Curriculum Vitae was submitted during the RLP process. (See Exhibit 1).

**Factor 2: Development Team and Key Personnel Past Performance.**

**Erroneous Evaluation Of Past Performance Reference.** MMC was scored at 6.0/10. During the Agency Protest proceeding, GSA stated that it had downgraded MMC's Proposal 40% based on what is described as a "marginal" Reference from the Kagman Community Health Center (GSA Exhibit 17, attached hereto). However, reviewing the scores provided in the Reference shows an average of 8 out of 10 – hardly a marginal response. Furthermore, this was a tenant improvement project that did not involve modifications to the outside of the building. One of only two factors rated a 6 out of 10 on the prior project was the materials used and overall appearance of the building, which was not part of the project. The GSA also noted that it was concerned that MMC did not offer an explanation for the "marginal" reference and that MMC



had requested that the reference not be considered during the RLP process. This concern is irrelevant to the fact that the reference itself was not "marginal" to begin with. There was no reasonable basis for MMC to be downgraded in this category.

**Factor 3: Facility Design.**

**Improperly Penalizing MMC's Facility Design As Incomplete At The "First Generation Plans" Phase.** MMC was scored at 4.0/10. The RLP specifically provided that the drawings to be submitted were "First generation plans" (Exhibit 12, 3.06 N.) and that after award the GSA and Awardee were to collaborate on "Design Intent Drawings," which were to conform to the "Agency Specific Requirements." (Exhibit 12, 1.07 E., 3.07 C.) In fact, the design team was to set aside a full 5 days to meet and collaborate. *Id.* GSA, however, significantly downgraded MMC's Facility Design based on what it considered incomplete information – which in fact were details more akin to final design documents, such as specific ceiling heights (as opposed to elevations that show necessary height accommodations) and exterior façade materials, where MMC provided the Government with various options. If MMC was to be graded on detailing specific design elements at the conceptual stage, the RLP should have requested specific drawings, and not "First Generation Plans." "An agency may not give importance to specific factors, subfactors, or criteria beyond that which would reasonably be expected by offerors." *Risk Analysis & Mitigation Partners*, B-409687, July 15, 2014, 2014 CPD ¶ 214 p. 11.

Regardless, the post-award notice (Exhibit 11) indicates numerous evaluation errors and the failure to take into account information submitted as part of MMC's proposal and subsequent submittals, including the revised drawing set submitted with MMC's Best and Final submission:

**Post award notice:** There was not enough information provided for the following sub-factors: finished ceiling heights, blast resistance, ease of access for data and telecommunications distribution, effectiveness and aesthetics of security provisions, and features which enhance the aesthetics of the interior space.

**MMC Response:** contrary to this criticism,

(1) Elevation drawings A-2.0 and A-2.1 were submitted which indicated the floor to floor heights. (See Exhibit 2).

(2) Drawing A-1.7 (Exhibit 3) addresses the issue of blast resistant ballistic windows and MMC supplemented its team with blast engineer Camden McConnell and submitted a revised DE-2 form (Exhibit 4.)

(3) Utility Rooms were identified for each floor providing for easy access for data and telecommunications facilities: Drawing A-201 (First Floor): RM# 117; RM# 192; RM# 193; RM# 123 (Main Electrical) and RM# 124 (Emergency Generator); Drawing A-202 (Second floor): RM# 266; RM# 271; Drawing A-203 (Third Floor): RM# 308; RM# 373. (See Exhibit 5.)



(4) Drawing A-201 reflects a security checkpoint in RM# 101A which is 383 sq. ft. which should allow for smooth pedestrian flow into the building as well as ample waiting room. This room was designed based on the San Diego Courthouse layout. (See Exhibits 5 and 6.)

**Post award notice:** There was no information regarding blast resistance provided. Further, no blast engineer was identified. In particular, both the lack of information about blast resistance and the blast engineer presented a significant concern to the SSEB since security of a federal courthouse is paramount both to occupants and to the public. Due to the lack of information on important issues in the FPR, the SSEB had significant concerns of unsuccessful performance.

**MMC Response:** A revised DE-2 form (Non-evaluated personnel) was submitted identifying Mr. Camden McConnell as the blast engineer. The form also outlined five (5) projects Mr. McConnell was a part of and his specific role for the project. (See Exhibit 4.)

**Post award notice:** Also, the proposed exterior building material is porous and lends itself to mold growth in high humidity conditions. The landlord is proposing to "power-wash" the exterior of building only once every 10 years - which is inadequate for prevention of mold which is a serious concern in a high humidity environment. Thus, the SSEB was concerned that the high likelihood of mold would detract from an otherwise attractive design.

**MMC Response:** The specific section of the Architectural Narrative being quoted was misinterpreted. (See Exhibit 7.) The paragraph describing the building's façade listed a number of options for materials that could be utilized. In the Architectural Narrative, the architect was merely pointing out that although inexpensive, utilizing natural stone or concrete could potentially lead to issues with mold. Other options were provided, such as ceramic-black granite veneers or enamel-coated metal panels that would eliminate this issue. *Id.*

#### **Factor 4: Site Layout & Design.**

**Ignoring Specific Design Aspects Provided In MMC's Materials.** MMC was scored at 5.0/10.0. Again the post-award notice (Exhibit 11) indicates evaluation errors and the failure to take into account information submitted as part of MMC's proposal and subsequent submittals:

**Post award notice:** MMC is proposing the construction of an office and retail development. The U.S. Courthouse would be one of three proposed buildings on the site. Development information about the proposed buildings, such as design, tenant-mix, and scheduled completion were not clear in the proposal. The site layout and design was deemed acceptable because it meets the standard in the RLP. However, a lack of detail in the plans resulted in a finding of a risk of unsuccessful contract performance as identified below.



- There was not enough information provided for the location of utility equipment/services, receiving dock, cooling tower/equipment, generator, transformers, fuel tank, and refueling port.
- The functional effectiveness and aesthetic appropriateness of the building placement and site design in relation to service and support functions (e.g. delivery, trash pick-up, etc) is lacking in the detailed drawings.

Further, the proposed parking lot plan requires pedestrians to cross vehicle traffic to access the building.

**MMC Response:** These purported deficiency was specifically addressed in the October 6, 2014 response to the oral review comments. The Architectural Narrative and Drawing A-100 (Exhibits 7 and 8) specifically addressed these concerns and were included as attachments to the October 6 response. Furthermore, Drawing A-101 (Site Plan) provides clear provisions for trash collection, Drawing A-201 (First Floor) clearly outlines a receiving dock in RM# 115 and Drawing A-201 (First Floor): Clearly outlines an emergency generator room in RM# 124. (See Exhibit 5.) Finally, the additional proposed structures will consist of office space and there is no planned retail.

#### **Factor 5: Site.**

**Inaccurately Downgrading MMC's Site Based On Speculation.** MMC was scored at 6.0/10.0. The post-award notice again indicates evaluation errors and the failure to take into account information submitted as part of MMC's proposal and subsequent submittals:

**Post-award notice:** The MMC site is Acceptable because it is within the delineated area and close to amenities. However, it still possesses a risk of unsuccessful contract performance due to its current use and condition and possible environmental contamination noted in the environmental report. The risk factor is also elevated by the proposal's reliance on developing a new public road to serve the site.

**MMC Response:** A commitment letter for the completion of the road was attached to the Best and Final submission. (See Exhibit 9.) A Phase II Implementation plan was also included in the Best & Final offer with a commitment letter from Unitek Environmental Guam for the completion of the action plan. (See Exhibit 10.) MMC's environmental engineer stated in the submitted materials that the work could be completed timely.

#### **DISCOVERY AND HEARING REQUEST**

MMC respectfully requests that, upon execution of the appropriate protective order under 4 C.F.R. 21.4, the GSA produce the following documents:





1. A copy of the Awardee's proposal and all supplements, modifications and additions, including best and final offers thereto;
2. A copy of all communications between GSA and the Awardee, both written and oral, regarding the RFP and the award;
3. All evaluations of MMC's and the Awardee's proposals, including all analysis of whether the Awardee's site complied with the RLP requirements;
4. Any internal communications within the GSA pertaining to the evaluation of MMC's and the Awardee's proposals; and
5. The Notice of Award to the Awardee.

MMC also requests a hearing pursuant to 4 C.F.R. § 21.7. The reason for the hearing is to present testimony, by both fact and expert witnesses, on the scope and impact of the Tsunami inundation zone and the NOAA Tsunami Hazard Assessment as it relates to the Awardee's site.

**RULING & RELIEF REQUESTED**

MMC requests that GAO issue a ruling sustaining this protest and recommending that the contract be awarded to MMC or such other remedy provided by law. MMC requests that the GSA suspend contract performance during the pendency of this Protest pursuant to 4 C.F.R. § 21.6. MMC also requests its fees and costs if this protest is sustained or, if appropriate, the cost of MMC's bid and proposal preparation.

Very truly yours,

(b) (6)

William J. Ohle

WJO:emc

Enclosures

cc: Marilyn M. Paik, Assistant Regional Counsel (*via e-mail*)  
Taniel Baghdikian, GSA Contracting Officer (*via e-mail, via Overnight Delivery*)  
Guadalupe Flores, GSA Contracting Officer (*via e-mail, via Overnight Delivery*)

